Supreme Court, U.S.
FILED
FEB 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-325

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners
v.
MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Respondents

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF THE STATES OF VERMONT, CONNECTICUT AND NEW JERSEY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Pursuant to Rule 36 of the Rules of this Court, the States of Vermont, Connecticut and New Jersey, by their Attorneys General, respectfully submit this Brief as *amici curiae* in support of Respondents.

INTEREST OF THE AMICI CURIAE

In *American Trucking Associations, Inc. v. Scheiner*, 107 S.Ct. 2829 (1987), the Court held unconstitutional certain flat highway user fees ("flat fees") imposed by states on motor carriers. These fees were specifically

dedicated to fund transportation facilities and were invalidated for not being proportional to the services rendered by the state. This case presents the issue, remanded to the Pennsylvania Supreme Court in *Scheiner*, 107 S.Ct. at 2847-2848, whether the rule announced in *Scheiner* should be applied prospectively only or retroactively, so as to require the refund of fees or taxes collected prior to the effective date of *Scheiner*.

Vermont, we believe, is unique among the states presently in litigation with American Trucking Associations, Inc. ("ATA") over the prospective application of *Scheiner*. In *ATA v. Conway*, [Vt.] St. Tax Rep. (CCH) para. 200-306 (Vt. Super. Ct., Washington Co., Feb. 11, 1988), on appeal, No. 88-156 Vt. Sup. Ct.), a single trial judge, by interim relief, established an escrow of Vermont's "flat fees" in April, 1986. At that time this Court's numerous precedents consistently upheld the validity of "flat fees." Vermont and other states relied on their validity.

In addition to Arkansas and Pennsylvania, at least Vermont, New Jersey, and Kentucky have the identical issue pending or soon to be raised in state supreme courts. It is unlikely the Vermont Supreme Court will decide the Vermont case before this Court rules in the instant case. This Court's disposition of ATA's challenge to the Arkansas Supreme Court decision may affect the disposition of the pending case before the Vermont Supreme Court.

INTRODUCTION AND SUMMARY

Scheiner should be held to apply prospectively only. The realization that the Constitution is silent on the question of prospectivity/retrospectivity dates at least to the decision of *Great Northern Ry. Co. v. Sunburt Oil & Refining Co.*, 287 U.S. 358 (1932). Since then the Court has applied decisions prospectively only many times in civil cases; the Court has also developed criteria to assess

whether decisions should be applied prospectively. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). State courts have adopted the *Chevron* test, *Solomon v. Atlantis Development, Inc.*, 145 Vt. 70, 483 A.2d 253 (1984) and, in addition to the instant case the application of the *Chevron* test has played a central role in cases brought to the Court, e.g., *National Can Corp. v. Washington Dept. of Revenue*, 749 P.2d 1286 (Wash.) *appeal dismissed, cert. denied*, 108 S.Ct. 2030 (1988) and *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W.Va. 1986), *appeal docketed*, No. 88-421.

The facts of the instant case do not lend themselves to a reconsideration of the *Chevron* test, which is still valid and should survive, but the Court *is* presented with a case for identification of appropriate events that can serve as the "break point" for prospective application of *Scheiner* and other appropriate cases.

There can be no doubt that *Scheiner* overruled clear past precedent on which the states and Petitioners relied. "Flat fees" were an economic fact of life in interstate commerce sanctioned by the Court from 1916 until *Scheiner*. See *Kane v. New Jersey*, 242 U.S. 160 (1916). Such fees are still levied on trucks in interstate commerce by Congress. Federal Heavy Vehicle Use Tax, § 4481 et seq. of the Internal Revenue Code of 1954, 26 U.S.C. § 4481 et seq. And every state imposes "flat fees" in the form of registration fees on virtually all vehicles regardless of the number of miles traveled. But even if the Court determines *Scheiner* did not establish new law by overruling clear past precedent, the decision cannot be said to have been foreshadowed. The watershed case of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) and the case it overruled, *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951) concerned taxes on the "privilege" of doing business in a state and not the use of a state's highways. This distinction is pointed up by the favorable citation of the *Aero Mayflower* line of "flat

fee" cases in *Massachusetts v. United States*, 435 U.S. 444 (1978), upholding a minimum "flat fee" on aircraft, and the exclusion of the issue from another "privilege" tax case, *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981) several years *after Complete Auto.*

Prospective-only application of *Scheiner* will fully serve the purpose of the new rule. *Scheiner* has removed any barriers to free trade among the states that "flat fees" may have presented. Retrospective application would not provide the ability to turn back the clock to reverse any discrimination and barriers that formerly existed. Furthermore, the requirement of refunds would free petitioners and their class from the permissible burden of paying their share of taxes needed to construct and maintain state highway systems.

Substantial "injustice or hardship" will occur in several states if *Scheiner* is applied retrospectively. Several hundreds of millions of dollars in fees, plus interest, are at stake in the several states in litigation with ATA. States will be forced to refund this money unless the Court determines they were entitled to rely on the precedents and/or lack of foreshadowing of *Scheiner*. The Court has recognized that "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct," *Lemon v. Kurtzman* (Lemon II), 411 U.S. 192 at 199 (1973), and that "(u)ntil judges say otherwise, state officers . . . have the power to carry forward the directives of the state legislature." *Id.* at 208. Now that the Court has "said otherwise," the states no longer have a justifiable "reliance interest" in earlier Court opinions validating "flat fees."

Other equitable considerations requiring prospective-only application of the new *Scheiner* rule are:

1. Any harm to petitioners was *de minimus*.

2. Petitioners have consistently *not* argued that "flat fees" were excessive.

3. Truckers did in fact "pass on" the costs of "flat fees" to their customers.

4. Large trucks have consistently been paying less than their cost responsibility to the states.

5. Truckers have and will continue to benefit directly from the expenditure of the "flat fees" for the construction and maintenance of highways, the truckers' very lifeblood.

Finally, to illustrate that treatment of "flat fees" and prospectivity by other states and courts vary greatly from the instant case, the chronology and lessons from the Vermont and New Jersey experiences are presented. The Court will see facts far different from those in the instant case, facts that show why the new rule in *Scheiner* should be applied prospectively only.

I. THE COURT'S DECISION IN *SCHEINER* SHOULD BE EFFECTIVE PROSPECTIVELY ONLY BECAUSE IT OVERRULED CLEAR PAST PRECEDENT ON WHICH THE LITIGANTS RELIED AND RETROSPECTIVE APPLICATION WILL NOT FURTHER OPERATION OF THE NEW RULE, BUT WILL PRODUCE SUBSTANTIAL INEQUITABLE RESULTS.

The issues before the Court are whether Arkansas, and ultimately several other states with identical and similar issues pending in state courts, must make refunds to non-domestic truckers (the petitioners) who paid flat highway user fees, ("flat fees") pursuant to state law, and, if so, as of what date.

While courts initially adopted the common law doctrine that an invalidated statute must be deemed a nullity from the moment of its adoption (". . . in legal contemplation

as inoperative as though it had never been passed" (*Norton v. Sheldon County*, 118 U.S. 425, 442 [1886]), the rigidity of the rule and the impractical and harsh results which it compelled in invalidating all past transactions made in reliance upon a purportedly legitimate statute led the Court in *Chicot Co. Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940), to reason that the "broad statements" of absolute retrospective invalidity espoused in *Norton* were unjustified:

> The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. . . . Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. [308 U.S. at 374.]

Synthesizing the concerns expressed in *Chicot*, the Court in *Chevron*, *supra*, in 1971 set forth three factors which govern modern prospectivity/retroactivity analysis in civil cases:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, . . . "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker*, 381 U.S. 618, at 629 (1965). Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court would produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity." [404 U.S. at 106-7, citations omitted.]

The *amici* would emphasize that the first or threshold factor in *Chevron* is disjunctive. The establishment of a new principle of law is required. But this can be "either by overruling clear past precedent . . ." *or* by "deciding an issue of first impression. . . ." *Id.*

A. The *Chevron* Test Is Still Valid.

Petitioners have not set forth any reasons why the *Chevron* test is inappropriate or outmoded. The actions of Arkansas and orders of its supreme court in the instant case, and Florida's legislature in Case No. 88-192, do not bring to the Court the question of the propriety or validity of the *Chevron* test. For, regardless of the factors in any test sanctioned by the Court, proper application will depend on the ability, objectivity, and integrity of those applying it.

The *Chevron* test is still valid and should survive. It should *not* be constricted and made more difficult to apply based on different, though compelling, interests of justice in criminal procedure cases. See, *Griffith v. Kentucky*, 107 S.Ct. 708 (1987). The second and third factors of the *Chevron* test provide for the *ad hoc* analysis necessary when a new rule of law is established under one of the alternative thresholds of the first factor.

With proper application, and a valid determination of prospectivity, the Court does, however, need to adopt a rule or establish guidelines to set the proper date for prospective application. Depending on the case-specific facts, the date of prospective application will vary. Possible dates include:

1. The opinion date.
2. The date of the mandate.

3. The date petitioners sought to enforce *Scheiner*.

4. The date a local tribunal provided for timely enforcement.

B. *Scheiner* Overruled Clear Past Precedent on Which the Litigants Relied.

The first factor of the *Chevron* test sets forth alternative thresholds. For the "flat fee" issue, *Scheiner* "established a new principle of law . . . by overruling clear past precedent on which the litigants have relied." *Chevron, Id.* at 106. Thus *Chevron's* threshold factor is satisfied.

The petitioners are unable to cite a single case where the Court overturned facially neutral "flat fees" that were not excessive in amount prior to *Scheiner*. A long list of court opinions upholding flat fees begins with *Kane v. New Jersey, supra,* in 1916, includes the first *Aero Mayflower* case, *Aero Mayflower Transit Co. v. Georgia Public Service Comm'n,* 295 U.S. 285 (1935), and culminates with *Capitol Greyhound Lines v. Brice,* 339 U.S. 542 (1950). Furthermore, as noted by Justice O'Connor in her dissent in *Scheiner* the *Aero Mayflower* line of cases was "apparently cited with approval as recently as *Massachusetts v. United States,* 435 U.S. 444, 463-464," which was decided in 1978. *Scheiner,* 107 S.Ct. at 2848. In 1981, in *Commonwealth Edison Co. v. Montana,* 453 U.S. 609 (1981), the Court at 622, n. 12 put aside from its consideration " 'user' fees or 'taxes' that were designed and defended as a specific charge imposed by the state for use of state-owned or state-provided transportation . . . facilities." Given this history of "flat fees," it is inconceivable that an objective observer could determine other than that *Scheiner* overruled clear past precedent.

C. Petitioners Espouse the Inapplicable and Unnecessary Alternative From *Chevron's* First Factor and Do So Inaccurately.

Petitioners have attempted to persuade the Court that the *Chevron* test is not applicable to *Scheiner*. But citations to *Complete Auto* and *Commonwealth Edison* as authority that the *Scheiner* decision was foreshadowed are misplaced, even assuming the alternative "foreshadowing" alternative of the first factor in *Chevron* is applicable.

Close analysis of *Complete Auto* and the case it overturned, *Spector Motor Service v. O'Connor, supra,* shows those cases *expressly* were not intended to consider the *Aero Mayflower* "flat fee" cases. *Complete Auto* considered *only* the constitutionality of the so-called "privilege" taxes, i.e., where a state imposed a tax on a foreign corporation simply for the privilege of doing business in the state. The *Aero Mayflower* "flat fee" cases dealt with user fees for the specific use of a state's highways or other facilities. Moreover the two separate lines of cases made special effort to keep the two different types of taxes or fees separate.

In *Aero Mayflower Transit Co. v. Board of Railroad Commissioners,* 332 U.S. 495 (1947), at 504, the Court said:

> Appellant therefore confuses a tax "assessed for a proper purpose and . . . not objectionable in amount" . . . that is, *a tax affirmatively laid for the privilege of using the state's highways, with a tax not imposed on that privilege but upon some other such as the privilege of doing interstate business.* Though necessarily related in view of the nature of interstate motor traffic, the two privileges are not identical . . . (emphasis added)

Four years later, in 1951, the Court noted in *Spector, supra,* at 340 U.S. 606:

> There is no ground upon which the tax can be said to rest upon the use of highways by motor trucks. . . .

The Court went on: "The tax is not levied as compensation for the use of highways." *Id.* at 607, and then in footnote 4 the Court cited to *Aero Mayflower, Id.* at 607, and other flat fee cases as examples of valid highway user taxes.

Likewise, thirty years later in *Complete Auto* the tax challenged was for the *privilege of doing interstate business.* 430 U.S. at 274. The Court presented a lengthy discussion of the cases involving "privilege taxes," *Id.* at 279-283, yet none of the discussion focused on the "flat fee" cases, which involved taxes specifically for the use of state highways.

Thus, the Court in *Complete Auto* specifically kept alive the distinction between cases involving "privilege taxes" and cases involving taxes levied as compensation for the use of highways.

This was made clear again in *Commonwealth Edison,* when in 1981 the Court applied the *Complete Auto* test to a "privilege tax." In noting the difference between the two types of taxes the Court stated:

> Consequently, in reviewing appellant's contentions, we put to one side those cases in which the Court reviewed challenges to "user" fees, or "taxes" that were designed and defended as a specific charge imposed by the state for use of state-owned or state-provided transportation or other facilities and services. . . . As the Court has stated "such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes."

Commonwealth Edison, supra, 453 U.S. at 621, 622, n. 12.

Contrary to "foreshadowing" *Scheiner, Complete Auto* and *Commonwealth Edison* clearly kept alive the distinction between "privilege taxes" and "user fees." The new rule as to the former in *Complete Auto* provided no clues to conscientious state administrators that "flat fees" would be struck down eleven years later.

In order to function in modern society state officials and others must be able to rely on the Court's procedents until they are overruled or altered by statute. This is so even if one applies the second alternative (foreshadowing) from *Chevron*'s first factor:

> A decision that overrules much-criticized precedent may well have been clearly foreshadowed. . . . Our cases indicate that even in this situation authorities are generally entitled to rely on existing case law, whatever its disrepute. *Solem v. Stumes,* 465 U.S. 638, at 646, n. 6 (1984).

D. Prospective-Only Operation Fully Serves the Purpose and Effect of the New *Scheiner* Rule.

In the second factor of the *Chevron* test the Court must

> . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. *Chevron, supra,* 404 U.S. at 107.

The history is helpful in this analysis. "Flat fees" were permissible and constitutional so long as they were not excessive. The purposes included providing the states the ability to run their financial affairs regarding highways as best fit their fiscal and administrative needs so long as the level of taxes was not excessive and to have interstate commerce pay its fair share of the tax burden. The new rule, set in the central purpose of the Commerce Clause, is intended to create an area of free trade among states, *Scheiner,* 107 S.Ct. 2829 at 2838, *and* allow for interstate commerce to be made to pay its fair share of the tax burden. *Complete Auto,* 430 U.S. 274, at 288.

It is impossible for retrospective application of the new rule to "encourage free trade among the states since whatever chill was imposed on interstate trade is in the past" and all affected states have discontinued collecting the offending fees. See *National Can Corp. v. Dept. of Revenue, supra.*

Furthermore, if the Court affords retroactive application and requires refunds in Arkansas prior to *Scheiner*, foreign-registered trucks will escape responsibility for their share of the tax burden. Upon extension to pending cases in other states the petitioners and others will reap further enormous windfalls. Retroactive application with refunds of all "flat fees" would create an open or "window" period of fee-free time for out-of-state motor carriers to the detriment, at least in some of the states, of those whose trucks are registered in-state.

"Flat fees" that do not meet the test set forth in *Scheiner*, 107 S.Ct. at 2847, are *now* known to be impermissible. By application of *Scheiner* states can *prospectively* adopt fees that will serve to have interstate commerce pay its share of tax burdens while not running afoul of the central Commerce Clause purpose.

Also, the central purpose of the Commerce Clause—free trade among the states—cannot be enhanced by retroactive application of *Scheiner*. The conduct now determined to be unconstitutional by *Scheiner* has already occurred and cannot be rectified with hindsight. Forcing Arkansas and other states to pay refunds will do nothing to ensure freer trade among the states for the past periods. And retroactive application will discriminate against and be detrimental to other taxpayers by freeing much of interstate commerce from paying its share of the tax burden.

Since the discriminatory nature of "flat fees" on interstate commerce—at least where such fees are revenue

producing as opposed to cost-recovering—is now settled, there is no further potential for states to adopt impermissible flat fees and validly claim a "reliance interest" on long-standing Court opinions. See also *Lemon v. Kurtzman* (*"Lemon II"*, *supra.* Therefore, there can be no validity to the argument that refunds should be ordered as a remedial measure to ensure that the states will not enact discriminatory highway taxes in the future. Even under the illogical assumption that the payment of refunds would affect the thinking of present or future legislatures, there is no valid suggestion that any state has acted in bad faith or will do so in the future in the enactment of "flat fees."

Retrospective application and refunds are not necessary as a reward to petitioners for litigating the "flat fee" issue and as an incentive to others to attack unsound law. As primarily "an institutional litigant . . . with interest in overturning legal rules . . . ," Petitioners —ATA and its Litigation Center—should find "incentive and reward enough in achieving only prospective overruling." Traynor, *"Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility,"* 28 Hastings L.J. 533, 546-547 (1977). And the other petitioners will benefit from prospective application of the new rule.

Lastly, prospective-only application of the Court's decision will not interfere with or retard operation of the new rule. There can be no actual indication in the record that "flat fees" in fact hindered free trade in the past; nor is it possible to show that refunding "flat fees" collected prior to *Scheiner's* effective date will increase such trade in the future. Petitioners have not demonstrated any actual harm; indeed their claim is based on the argument that no harm need be demonstrated because of the argued inherent discrimination of flat fees. At page 8 of its reply brief in *Scheiner*, ATA stated:

> In fact, appellants have never challenged the *level* of either the marker fee or the axle tax. (Emphasis in original.)

The effect of the prior rule—validity of "flat fees"—has now been determined to be discriminatory against interstate commerce. But the Court did not so opine until its *Scheiner* decision on June 23, 1987. Retrospective application of *Scheiner* will neither further the new *Scheiner* rule nor retard the old *Aero Mayflower* rule. If discrimination in fact occurred under the old rule, it has occurred and cannot be reversed; those affected cannot be relieved from any past discrimination. Applying the *Scheiner* decision retrospectively would deplete state coffers without resulting in any freer trade among the states either in the past or the future. In addition, it would allow petitioners to receive windfalls and avoid paying their share of the tax burden to construct and maintain the highways in several states.

E. Equitable Considerations Require Prospective-Only Application of the New *Scheiner* Rule.

The third, and last, part of the *Chevron* test is the weighing of the inequity imposed by retrospective application, for

> (w)here a decision of this Court would produce substantial inequitable results if applied retrospectively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity. *Chevron, supra*, 404 U.S. at 107.

The Court has, a number of times, held legislation unconstitutional and given only prospective effect to its holdings in order to avoid undue administrative or financial burdens on government, e.g., *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Lemon II, Supra; City of Phoenix v. Kulodziejski*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

The Court's decision in *Lemon II, supra*, is particularly instructive. In *Lemon v. Kurtzman* (*Lemon I*), 403 U.S. 602 (1971) the Court held that a Pennsylvania statute

under which the state reimbursed private sectarian schools for secular educational services was unconstitutional. The issue then arose regarding the propriety of payments for services rendered prior to the Court's opinion. The lower court enjoined future payments, but permitted the state to pay $24 million to schools for services provided before *Lemon I*. The Court affirmed, stating:

> The process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is "among the most difficult of those which have engaged the attention of courts, state and federal. . . ." (Citation omitted.) Consequently, our holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct "is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, or prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.'" (Citations omitted.) [S]*tatutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity.* Appellants offer no persuasive reason for confining the modern approach to those constitutional cases involving criminal procedure or municipal bonds, and we ourselves perceive none. (Emphasis added.) *Lemon II, supra*, 411 U.S. at 198-199.

The Court stated that the problem essentially related to "the appropriate scope of federal equitable remedies, a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional," and that "equitable remedies are a special blend of what is necessary, what is fair, and what is work-

able." *Id.* at 199 (footnote omitted). The Court noted that "reliance interests weigh heavily in the shaping of an appropriate equitable remedy," *id.* at 203, and added:

> Appellants ask, in effect, that we hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional. Appellants would have state officials stay their hands until newly enacted state programs are "ratified" by the federal courts, or risk draconian, retrospective decrees should the legislation fall. In our view, appellants' position could seriously undermine the initiative of state legislators and executive officials alike. Until judges say otherwise, state officers . . . have the power to carry forward the directives of the state legislature. Those officials may, in some circumstances, elect to defer acting until an authoritative judicial pronouncement has been secured; but particularly when there are no fixed and clear constitutional precedents, the choice is essentially one of political discretion and one this court has never conceived as an incident of judicial review. We do not engage lightly in post hoc evaluation of such political judgment, founded as it is on "one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law." *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, at 60, 93 S.Ct. 1278, at 1311, 36 L.Ed.2d 16 (1973) (Stewart, J., concurring).

Lemon II, *supra*, at 207-208.

The principles and result of *Lemon II* as it applied to *Lemon I* are equally valid in the present case as it relates to *Scheiner*, for Arkansas and other states were able to follow over six decades of unflinching Supreme Court validation of "flat fees."

In addition, the following equitable considerations also dictate the necessity for prospective-only application of the rule in *Scheiner*.

1. In the absence of a bona fide argument that there has been any harm to petitioners, there is no basis or reason for applying the new rule retrospectively so as to provide refunds. As noted, ATA did not question the reasonableness of the marker fee and axle tax challenged in *Scheiner*.

2. The justified "reliance interest" that grew up around the pre-*Scheiner* rule evinces the inequitable results of retroactive application of the new rule in *Scheiner*. This is evidenced by Justice O'Connor's dissent:

> . . . this particular issue has been settled now for over 50 years and Congress has not seen fit to preempt these taxes by exercising its commerce power, though, of course, it has had recent occasion to consider and reconsider the problems of the trucking industry.
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> * * * *
>
> . . . the reliance interest sought to be protected by the doctrine of *stare decisis* has grown up around the settled rule. . . . In my view, Pennsylvania, in structuring its program, for financing highway construction and repair, had every reason to rely upon the settled understanding that flat highway taxes reasonably related to the extent of the benefit conferred do not violate the Commerce Clause. *Scheiner*, *supra*, 107 S.Ct. 2848-2849.

3. Balanced against the states' reliance on the "flat fee" cases and the need for the revenues for highway programs is the lack of measurable economic harm to the petitioners. In Vermont and New Jersey, at least, any economic harm suffered by truckers on account of "flat fees" was minute.[1]

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[1] Assuming *only* a thousand miles travelled in a state in a "fee" year (less than eight one-way trips through Vermont on I-89 or

4. Small as this potential financial harm was, ATA has admitted truckers did not in reality bear it. The burden of "flat fees" was passed on to petitioners' customers in the form of higher shipping rates.[2] Having not borne the economic burden of the "flat fees" in the first place, refunds to petitioners will be windfalls.

ATA's admission that truckers do not in fact bear the burden of truck taxes results in the conclusion that "any financial harm suffered by the plaintiffs by virtue of their payment of the tax is negligible at best." *Metropolitan Life Ins. Co. v. Commissioner*, 373 N.W.2d 399, at 412 (N.D. 1985). The equity in relation to providing refunds to reimburse those who paid the "flat fees", thus, does

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I-91), with a tare weight of 30,000 lbs. and payload of only 40,000 lbs. (legal payload capacity would be 40,000 lbs. for a gross vehicle weight of 80,000 lbs.), the additional cost per truck would be only five cents ($.05) per mile of operation and 1.6 miles or .16 cents ($.0016) per pound of payload. In *ATA v. Kline*, No. 07-14-1667-85 MVT (N.J. Tax Co., Sept. 8, 1988) the parties stipulated that the per mile cost to operate in New Jersey during 1984 was approximately 90 cents per mile, and that the $25 decal fee accounted for one to two percent of the cost, i.e., between .9 and 1.56 cents per mile, even less than the Vermont example.

[2] Petitioners, through ATA, have admitted this. In testimony before the Vermont Legislature's Motor Truck Taxation Study Committee on August 26, 1987. ATA's State Government Relations Manager, Cynthia Elliott, testified:

> First of all I would like to clarify where the burden of the trucking industry taxes ultimately falls. When I say the burden of the trucking industry taxes, I refer to those of the interstate trucking industry. The fact is that in the end everyone who uses interstate service provided by trucker, and in the case of Vermont that is 89 percent of your manufacturers and shippers, you eventually pay increased taxes through rate increases. Virtually everyone needs the services of the trucking industries and ultimately everyone pays for them.

Later in her testimony, Ms. Elliott clarified that the burden of Vermont's "flat fee" was not passed on directly, *e.g.*, by a direct add-on to shipping contracts, but rather was passed on over time through rate increases.

not favor retrospective application of *Scheiner* and concomitant refunds to the truckers.

5. The 1982 cost allocation study of the Federal Highway administration ("FHWA") and the ones done by states in the late 1970's and 1980's have determined that large trucks have not been paying their cost responsibility. *Indiana Highway Cost Allocation Study: Final Report*, at 46, FHWA and Indiana Dept. of Highways (1985). Indeed, unchallenged affidavits in the Vermont case (*ATA v. Conway*, Vermont Supreme Court Docket No. 88-156) show that for 1985 large trucks paid, at best, 72% of their cost responsibility to Vermont. At worst, they paid 52%. With similar situations in other states as noted in the *Indiana Study*, denial of pre-*Scheiner* "flat fee" revenues will exacerbate this situation for the period in question.

6. Appellee truckers have benefitted and will continue to benefit directly from the expenditure of the "flat fees" collected. In Vermont and other states the "flat fees" were dedicated to the Transportation Fund by law (19 V.S.A. § 11) and they were used primarily, if not exclusively, for construction, maintenance, and policing of highways. Clearly petitioners have used and intend to use Vermont's highways with their heavy trucks. Their actions show that they do not wish to bear their share of the tax burden, however.

7. "Flat fees" have been an economic fact of life in Vermont and New Jersey for decades. See *State v. Caplan*, 100 Vt. 159 (1927) and *N.J. Stat. Ann.* § 54:39A-10. And the precursor to the most recent "flat fee" in Vermont was in place for 30 years, from 1951 until 1981, when the first Fuel User License Fee (FULF) was adopted. See 23 V.S.A. §§ 415 and 3007. The long-term existence of these "flat fees" demonstrates that they have played an integral role in transportation finances, including construction of the interstate system, and that at

least two states—Vermont and New Jersey—had long-standing reliance interests on the continued validity of "flat fees" prior to the Court's opinion in *Scheiner*.

II. THE HISTORY OF "FLAT FEES" IN VERMONT AND NEW JERSEY ILLUSTRATE THE HARSH RESULTS THAT WOULD FLOW FROM WHOLESALE REVERSAL OR RESTRICTION OF THE *CHEVRON* TEST.

A. New Jersey's "Flat Fee."

New Jersey's truck identification marker fee ("decal fee") was first imposed in 1963 as part of the newly enacted motor fuels use tax. 1963 *N.J. Laws, c.* 44, N.J. Stat. Ann. § 54:39A-10.

When enacted in 1963, the decal fee was $3. 1963 *N.J. Laws, c.* 44, § 10. In 1979 the fee was increased to $6, 1979 *N.J. Laws, c.* 4, § 1, and in 1984 the fee was increased to $25 by 1984 *N.J. Laws, c.* 73, § 34. At all times the fee was identical for New Jersey and out-of-state trucks. There were no challenges to the fee between 1963 and 1984. The 1984 increase in the fee was part of a package designed to fund the New Jersey Transportation Trust Fund Authority Act, the purpose of which is to maintain the state's highway system. The $25 fee went into effect on July 10, 1984, and was challenged on October 31, 1984 by ATA.

ATA initially requested a preliminary injunction, but later withdrew that request and sought an escrow of the decal fee as well as certification of a class of out-of-state based carriers. The New Jersey Tax Court's denial of interim relief and its certification of a class were affirmed on interlocutory appeal.

The parties then proceeded to prepare for trial. Before the Tax Court could rule, this Court handed down its opinion in *Scheiner*.

On August 18, 1987, New Jersey advised the Tax Court and ATA that it could no longer defend the $25 fee in light of *Scheiner*, would stop collecting the fee on the following day, and would voluntarily refund all fees collected after June 23, 1987. New Jersey further advised that it would not refund some $34 million collected from carriers based out-of-state between the July 10, 1984 effective date of the fee increase and June 24, 1987, as it believed the *Scheiner* opinion should have only prospective effect.

The parties then filed supplementary briefs on the prospectivity issue. Additionally, New Jersey retained the services of an economist who supplied a written report and testified in depositions that the economic burden of the decal fee was passed forward within one year at the most to the carriers' customers. ATA contested this assertion with its own expert.

On December 4, 1987, the Owner-Operators Independent Drivers Association ("OOIDA") moved to intervene claiming that in many cases where truckers used owner-operators the decal fee was charged to the owner-operators pursuant to lease agreements and that accordingly any refunds should be paid to the owner-operators rather than to the carriers.

On September 8, 1988, in an unpublished letter opinion, the New Jersey Tax Court held that *Scheiner* should be given retroactive effect and that New Jersey should accordingly refund the $34 million collected from out-of-state truckers. No final order has yet been entered because the parties, including OOIDA, are negotiating a distribution plan under the court's supervision. Unless foreclosed by this Court's decision in the instant case, New Jersey intends to appeal.

B. Vermont's History of "Flat Fees."

"Flat fees" were first adopted in Vermont in 1925, Acts 1925, No. 70. The specific form of "flat fee" was in effect, unchallenged, from 1951, initially at $10 per year plus $3 per trip, and amended upward three times, until 1981. In 1981 ATA and two corporate truck carriers challenged the "flat fee" provision then applicable against all non-Vermont trucks when the Vermont legislature increased the annual fee from $20 to $40 per year and the trip fee from $10 to $15 (*ATA v. Conway*, 146 Vt. 574 508 A.2d 405 [1986] *cert. denied* 107 S.Ct. 9262 [1987] ["*ATA #1*"]). The trial court upheld the "flat fees," but the Vermont Supreme Court remanded with directions but without determination on the merits. (*ATA v. Conway*, 142 Vt. 17, 451 A.2d 42, [1982] ["*ATA #1A*"].)

Prior to definitive determination by the courts in *ATA #1* the legislature instituted a diesel fuel tax (23 V.S.A. §§ 3001 et seq.) and its accompanying $50 fuel user license fee ("FULF") (23 V.S.A. §§ 3007, 3010, and 415). That too was challenged shortly after passage in 1982, *ATA v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986), *cert. denied* 107 S.Ct. 3262 (1987) ("*ATA #2*"). In its order the trial court rejected the *Aero Mayflower* line of cases of this Court and adopted the reasoning of the Maine Supreme Court in *ATA v. Quinn*, 437 A.2d 623 (Me., 1981), and declared the FULF unconstitutional because of the relative cost differences per mile of travel applicable to Vermont and non-Vermont trucks.

The Vermont Supreme Court, in its decisions in *ATA #1 and ATA #2* did not reach the issue decided by the trial court in *ATA #2*. Instead it held that the "flat fees" were facially discriminatory because in *ATA #1*, even though the "flat fees" were in lieu of a diesel fuel tax, they were applicable only to non-Vermont trucks,

and in *ATA #2* the "flat fee"—charged against all trucks—was a credit against the cost of Vermont registrations.[3]

Because of the late date of the Vermont Supreme Court's decisions in *ATA #1* and *ATA #2*—February 21, 1986—in relation to Vermont's legislative session, the legislature chose to replace the facially discriminatory "flat fees" by re-adopting the FULF and terminating the facial discrimination, thus making the FULF consistent with this Court's *Aero Mayflower* line of cases. Three days later ATA filed suit against five Vermont officials challenging the constitutionality of the FULF on behalf of a class of motor carriers having their base truck registrations in states other than Vermont. Simultaneously, ATA moved for an injunction or escrow of funds collected. The trial court judge who had ruled in ATA's favor in *ATA #2* was sought out in another county for the purpose of interim relief, but the case was filed in a different county; the judge ordered *ex parte* interim relief in the form of escrow.

On June 23, 1987, the Court handed down the *Scheiner* case. Twenty-five days later the Court's mandate issued in *Scheiner* pursuant to Court Rule 25. However, the Court's *Scheiner* opinion changed the "flat fee" rule, and established anew that:

1. Revenue producing—as opposed to cost recovering—"flat fees" in interstate commerce are probably discriminatory against interstate commerce.

2. The test in *Scheiner*, 107 S.Ct. at 2847, is that "flat fees" are valid "when they are the only practicable means of collecting revenues from users and the use of a more

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[3] The Vermont Supreme Court denied refunds based on the doctrine of sovereign immunity and the court denied *cert.*, 107 S.Ct. 3262 (1987), in both *ATA #1* and *ATA #2* as part of a combined petition.

finely gradated user fee schedule would pose genuine administrative burdens."

3. The Court remanded the question of refunds for a determination whether the ruling should be applied retroactively. *Id.* at 2847-2848.

On September 11, 1987, ATA filed a motion for summary judgment based on *Scheiner* and asked for refund of all fees paid. The Vermont officials countered with a cross motion for summary judgment on the issue of refunds. The Vermont officials determined that the 5-4 decision in *Scheiner* was controlling in the pending case and did not oppose injunction of the FULF. In early 1988, the superior court ordered that full refunds were to be made. The Vermont officials appealed and oral argument was held on October 13, 1987.

C. Relevance of Vermont's and New Jersey's Flat Fees to the Instant Case.

The facts surrounding Vermont's and New Jersey's "flat fees" establish:

1. The New Jersey decal fee was enacted in 1963, well before *Complete Auto* was handed down. Vermont had "flat fees" as part of its highway use fees for over sixty years. Under the Court's "flat tax" analysis as set forth in *Scheiner*, New Jersey's decal fee, e.g., at $3 in 1963 was as unconstitutional as a $25 fee in 1984.[4]

2. No one challenged New Jersey's decal fee for 20 years or Vermont's predecessor flat fee to the FULF for 30 years.

3. The increases in the New Jersey fee from $6 to $25 in 1984 and the Vermont fee from $20 to $40 in 1981 were parts of broad packages to increase funds for highway programs. Both states sought to raise revenue from both in-state vehicles (through registration fees) and from other in- and out-of-state vehicles through increases in the fuels tax and the decal fee and, in the case of Vermont through both increases in registration fees and the flat fees on out-of-state trucks.

4. The New Jersey decal fee was purely and simply a "flat fee" with no hint of facial discrimination, as was the most recent Vermont FULF.

5. As a result of the certification of a class and the sanctioning of a single class-wide refund claim, New Jersey is at risk for the full $34 million rather than a lesser amount as would be the case if its refund claim statute applied. *See N.J. Stat. Ann.* 54:39A-19 and *N.J. Stat. Ann.* 54:49-14.

6. As New Jersey's decal fee was not escrowed, the revenues have been spent.

7. a. New Jersey promptly and fully obeyed this Court's holding in *Scheiner*, conceding that the decal fee was invalid and volunteering to refund all fees collected after June 23, 1987.

b. Vermont also promptly obeyed this Court's holding in *Scheiner*, conceding that the FULF was invalid as soon as ATA sought to enforce *Scheiner* in Vermont.

8. a. The propriety of an award of refunds of "flat fees" involves numerous state law questions including, in New Jersey, the existence and effect of a statutory refund provision, namely *N.J. Stat. Ann.* 54:39A-19, the effect of a stipulation regarding the availability of a remedy, the propriety of class actions in tax cases, the propriety of a single refund claim on behalf of a class, the demonstrable lack of harm to truckers who by contract passed on the burden of the fee to owner-operators, and the economic argument that truckers generally passed on the burden of the decal fees to their customers.

[4] If the cost of issuing a decal is currently $1 in New Jersey, which ATA did not contest, it was less in 1963, and thus the fee, even at $3, plainly exceeded the cost of issuance.

b. In Vermont state law issues involve the qualifications of the three plaintiffs to bring and maintain actions in Vermont's courts, the propriety of the class action and notice of the action provided to the class, the propriety of the interim relief pursuant to law at the time it was granted, and sovereign immunity.

Any ruling by this Court as to the prospective or retroactive application of the *Scheiner* opinion should be sensitive to those and other very individualized state law issues.

Ultimately, the above facts establish that the picture painted by ATA in the instant case is highly misleading. New Jersey, e.g., did not in 1984 enact a questionable flat fee; it simply raised a fee which had gone unchallenged for 20 years. Nor did New Jersey or Vermont ignore or attempt to evade this Court's holding in *Scheiner*. Nor can it be said that the courts of New Jersey have reversed the general rule that judicial decisions have retroactive effect for a general rule of prospectivity in state tax cases. In *Exxon Corp. v. Hunt*, 109 *N.J.* 110, 534 A.2d 1 (1987), the New Jersey Supreme Court declined to hold that this Court's decision preempting the New Jersey spill compensation tax, *Exxon Corp. v. Hunt*, 475 U.S. 305 (1986), should be prospectively applied. In *Private Truck Council of America, Inc. v. State*, 221 N.J. Super. 89, 534 A.2d 13 (N.J. App. Div. 1987), aff'd o.b. 111 N.J. 214, 544 A.2d 33 (1988), the Appellate Division of the New Jersey Superior Court concluded that New Jersey's so-called retaliatory truck tax was unconstitutional and should be refunded from the date the complaint was filed. Finally, in both New Jersey's and Vermont's flat fee litigation, the trial level courts have denied the states' requests for prospective application of *Scheiner*. This is hardly consistent with a pattern of state courts routinely denying refunds of unconstitutional state taxes.

CONCLUSION

For the reasons set forth above, the rule adopted in *Scheiner* should be effective prospectively only and the Court should not use the instant case to reverse or otherwise eviscerate the *Chevron* test.

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